

Office of the Secretary, HUD

§ 1.10

The failure of an applicant or recipient to request a hearing under this paragraph (a) or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 1.8(c) and consent to the making of a decision on the basis of such information as is available.

(b) *Hearing procedures.* Hearings shall be conducted in accordance with 24 CFR part 180.

38 FR 17949, July 5, 1973, as amended at 61 FR 52217, Oct. 4, 1996]

§ 1.10 Effect on other regulations; forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against persons on the ground of race, color, or national origin under any program or activity to which this part applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant or recipient for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to January 3, 1965. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendments thereof):

(1) Executive Orders 11246 and 11375 and regulations issued thereunder, or

(2) Executive Order 11063 and regulations issued thereunder, or any other order, regulations or instructions, insofar as such order, regulations, or instructions, prohibit discrimination on the ground of race, color, or national origin in any program or activity or situation to which this part is inapplicable, or prohibit discrimination on any other ground.

(b) *Forms and instructions.* The responsible Department official shall assure that forms and detailed instructions and procedures for effectuating

this part are issued and promptly made available to interested persons.

(c) *Supervision and coordination.* The Secretary may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such department or agency, responsibilities in connection with the effectuation of the purposes of title VI of the Act and this part (other than responsibility for final decision as provided in § 1.10), including the achievement of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of title VI and this part to similar programs or activities and in similar situations. Any action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though such action had been taken by the responsible official of this Department.

38 FR 17949, July 5, 1973. Redesignated at 61 FR 52217, Oct. 4, 1996]

PART 4—HUD REFORM ACT

Subpart A—Accountability in the Provision of HUD Assistance

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Subpart A—Accountability in the Provision of HUD Assistance

§ 4.1 Purpose.

The provisions of this subpart A are authorized under section 102 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989) (42 U.S.C. 3537a) (hereinafter, Section 102). Both the provisions of Section 102 and this subpart A apply for the purposes of Section 102. Section 102 contains a number of provisions designed to ensure greater accountability and integrity in the way in which the Department makes assistance available under certain of its programs.

§ 4.3 Definitions.

Applicant includes a person whose application for assistance must be submitted to HUD for any purpose including approval, environmental review, or rent determination.

Assistance under any program or discretionary fund administered by the Secretary is subject to Section 102(a), and means any assistance, under any program administered by the Department, that provides by statute, regulation or otherwise for the competitive distribution of funding.

Assistance within the jurisdiction of the Department is subject to Section 102(b), and means any contract, grant, loan, cooperative agreement, or other form of assistance, including the insurance or guarantee of a loan or mortgage, that is provided with respect to a specific project or activity under a program administered by the Department, whether or not it is awarded through a competitive process.

Assistance within the jurisdiction of the Department to any housing project is subject to Section 102(d), and means:

- (1) Assistance which is provided directly by HUD to any person or entity, but not to subrecipients. It includes assistance for the acquisition, rehabilita-

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tion, operation conversion, modernization, renovation, or demolition of any property containing five or more dwelling units that is to be used primarily for residential purposes. It includes assistance to independent group residences, board and care facilities, group homes and transitional housing but does not include primarily nonresidential facilities such as intermediate care facilities, nursing homes and hospitals. It also includes any change requested by a recipient in the amount of assistance previously provided, except changes resulting from annual adjustments in Section 8 rents under Section 8(c)(2)(A) of the United States Housing Act of 1937 (42 U.S.C. 1437f);

- (2) Assistance to residential rental property receiving a tax credit under Federal, State or local law.

- (3) For purposes of this definition, assistance includes assistance resulting from annual adjustments in Section 8 rents under Section 8(c)(2)(A) of the United States Housing Act of 1937, unless the initial assistance was made available before April 15, 1991, and no other assistance subject to this subpart A was made available on or after that date.

Housing project means:

- (1) Property containing five or more dwelling units that is to be used for primarily residential purposes, including (but not limited to) living arrangements such as independent group residences, board and care facilities, group homes, and transitional housing, but excluding facilities that provide primarily non-residential services, such as intermediate care facilities, nursing homes, and hospitals.

- (2) Residential rental property receiving a tax credit under Federal, State, or local law.

Interested party means any person involved in the application for assistance, or in the planning, development or implementation of the project or activity for which assistance is sought and any other person who has a pecuniary interest exceeding the lower of \$50,000 or 10 percent in the project or activity for which assistance is sought.

Selection criteria includes, in addition to any objective measures of housing and other need, project merit, or efficient use of resources, the weight or

relative importance of each published selection criterion as well as any other factors that may affect the selection of recipients.

§ 4.5 Notice and documentation of assistance subject to section 102(a).

(a) *Notice.* Before the Department solicits an application for assistance subject to Section 102(a), it will publish a Notice in the FEDERAL REGISTER describing application procedures. Not less than 30 calendar days before the deadline by which applications must be submitted, the Department will publish selection criteria in the FEDERAL REGISTER.

(b) *Documentation of decisions.* HUD will make available for public inspection, for at least five (5) years, and beginning not less than 30 calendars days after it provides the assistance, all documentation and other information regarding the basis for the funding decision with respect to each application submitted to HUD for assistance. HUD will also make available any written indication of support that it received from any applicant. Recipients of HUD assistance must ensure, in accordance with HUD guidance, the public availability of similar information submitted by subrecipients of HUD assistance.

§ 4.7 Notice of funding decisions.

HUD will publish a Notice in the FEDERAL REGISTER at least quarterly to notify the public of all decisions made by the Department to provide:

- (a) Assistance subject to Section 102(a); and
- (b) Assistance that is provided through grants or cooperative agreements on a discretionary (non-formula, non-demand) basis, but that is not provided on the basis of a competition.

§ 4.9 Disclosure requirements for assistance subject to section 102(b).

(a) *Receipt and reasonable expectation of receipt.* (1) In determining the threshold of applicability of Section 102(b), an applicant will be deemed to have received or to have a reasonable expectation of receiving:

- (i) The total amount of assistance received during the Federal fiscal year during which the application was submitted;

- (ii) The total amount of assistance requested for the fiscal year in which any pending application, including the current application, was submitted; and

- (iii) For the fiscal year described in paragraph (a)(1)(ii) of this section, the total amount of assistance from the Department or any other entity that is likely to be made available on a formula basis or in the form of program income as defined in 24 CFR part 85.

(2) In the case of assistance that will be provided pursuant to contract over a period of time (such as project-based assistance under Section 8 of the United States Housing Act of 1937), all amounts that are to be provided over the term of the contract, irrespective of when they are to be received.

(b) *Content of disclosure.* Applicants that receive or can reasonably be expected to receive, as defined in paragraph (a) of this section, an aggregate amount of assistance that is in excess of \$200,000 must disclose the following information:

- (1) Other governmental assistance that is or is expected to be made available, based upon a reasonable assessment of the circumstances, with respect to the project or activities for which the assistance is sought;

- (2) The name and pecuniary interest of any interested party; and

- (3) A report of the expected sources and uses of funds for the project or activity which is the subject of the application, including governmental and non-governmental sources of funds and private capital resulting from tax benefits.

(c) In the case of mortgage insurance under 24 CFR subtitle B, chapter II, the mortgagor is responsible for making the disclosures required under Section 102(b) and this section, and the mortgagee is responsible for furnishing the mortgagor's disclosures to the Department.

(Approved by the Office of Management and Budget under control number 2510-0011)

§ 4.11 Updating of disclosure.

(a) During the period in which an application for assistance covered under Section 102(b) is pending, or in which such assistance is being provided, the

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applicant must report to the Department, or to the State or unit of general local government, as appropriate:

(1) Any information referred to in Section 102(b) that the applicant should have disclosed with respect to the application, but did not disclose;

(2) Any information referred to in Section 102(b) that initially arose after the time for making disclosures under that subsection, including the name and pecuniary interest of any person who did not have a pecuniary interest in the project or activity that exceeded the threshold in Section 102(b) at the time of the application, but that subsequently exceeded the threshold.

(b) With regard to changes in information that was disclosed under Sections 102(b) or 102(c):

(1) For programs administered by the Assistant Secretary for Community Planning and Development:

(i) Any change in other government assistance covered by Section 102(b) that exceeds the amount of all assistance that was previously disclosed by the lesser of \$250,000 or 10 percent of the assistance;

(ii) Any change in the expected sources or uses of funds that exceed the amount of all previously disclosed sources or uses by the lesser of \$250,000 or 10 percent of previously disclosed sources;

(2) For all other programs:

(i) Any change in other government assistance under Section 102(b)(1) that exceeds the amount of assistance that was previously disclosed;

(ii) Any change in the pecuniary interest of any person under Section 102(b)(2) that exceeds the amount of all previously disclosed interests by the lesser of \$50,000 or 10 percent of such interest;

(iii) For all projects receiving a tax credit under Federal, State or local law, any change in the expected sources or uses of funds that were previously disclosed;

(iv) For all other projects:

(A) Any change in the expected source of funds from a single source that exceeds the lesser of the amount previously disclosed for that source of funds by \$250,000 or 10 percent of the funds previously disclosed for that source;

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(B) Any change in the expected sources of funds from all sources previously disclosed that exceeds the lesser of \$250,000 or 10 percent of the amounts previously disclosed from all sources of funds;

(C) Any change in a single expected use of funds that exceeds the lesser of \$250,000 or 10 percent of the previously disclosed use;

(D) Any change in the use of all funds that exceeds the lesser of \$250,000 or 10 percent of the previously disclosed uses for all funds.

(c) *Period of coverage.* For purposes of updating of Section 102(c), an application for assistance will be considered to be pending from the time the application is submitted until the Department communicates its decision with respect to the selection of the applicant.

(Approved by the Office of Management and Budget under control number 2510-0011)

§ 4.13 Limitation of assistance subject to section 102(d).

(a) In making the certification for assistance subject to Section 102(d), the Secretary will consider the aggregate amount of assistance from the Department and from other sources that is necessary to ensure the feasibility of the assisted activity. The Secretary will take into account all factors relevant to feasibility, which may include, but are not limited to, past rates of returns for owners, sponsors, and investors; the long-term needs of the project and its tenants; and the usual and customary fees charged in carrying out the assisted activity.

(b) If the Department determines that the aggregate of assistance within the jurisdiction of the Department to a housing project from the Department and from other governmental sources exceeds the amount that the Secretary determines is necessary to make the assisted activity feasible, the Department will consider all options available to enable it to make the required certification, including reductions in the amount of Section 8 subsidies. The Department also may impose a dollar-for-dollar, or equivalent, reduction in the amount of HUD assistance to offset the amount of other government assistance. In grant programs, this could result in a reduction of any grant

amounts not yet drawn down. The Department may make these adjustments immediately, or in conjunction with servicing actions anticipated to occur in the near future (e.g., in conjunction with the next annual adjustment of Section 8 rents).

(c) If an applicant does not meet the \$200,000 disclosure requirement in § 4.7(b), an applicant must certify whether there is, or is expected to be made, available with respect to the housing project any other governmental assistance. The Department may also require any applicant subject to this subpart A to submit such a certification in conjunction with the Department's processing of any subsequent servicing action on that project. If there is other government assistance for purposes of the two preceding sentences, the applicant must submit such information as the Department deems necessary to make the certification and subsequent adjustments under Section 102(d).

(d) The certification under Section 102(d) shall be retained in the official file for the housing project.

Subpart B—Prohibition of Advance Disclosure of Funding Decisions

§ 4.20 Purpose.

The provisions of this subpart B are authorized under section 103 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December 15, 1989) (42 U.S.C. 3537a) (hereinafter, Section 103). Both the provisions of Section 103 and this subpart B apply for the purposes of Section 103. Section 103 proscribes direct or indirect communication of certain information during the selection process by HUD employees to persons within or outside of the Department who are not authorized to receive that information. The purpose of the proscription is to preclude giving an unfair advantage to applicants who would receive information not available to other applicants or to the public. Section 103 also authorizes the Department to impose a civil money penalty on a HUD employee who knowingly discloses protected information, if such a violation of Section 103 is material, and authorizes the Department to

sanction the person who received information improperly by, among other things, denying assistance to that person.

§ 4.22 Definitions.

Application means a written request for assistance regardless of whether the request is in proper form or format.

Assistance does not include any contract (e.g., a procurement contract) that is subject to the Federal Acquisition Regulation (FAR) (48 CFR ch. 1).

Disclose means providing information directly or indirectly to a person through any means of communication.

Employee includes persons employed on a full-time, part-time, or temporary basis, and special government employees as defined in 18 U.S.C. 202. The term applies whether or not the employee is denoted as an officer of the Department. "Employee" is to be construed broadly to include persons who are retained on a contractual or consultative basis under an Office of Human Resources appointment. However, "employee" does not include an independent contractor, e.g., a firm or individual working under the authority of a procurement contract.

Material or materially means in some influential or substantial respect or having to do more with substance than with form.

Person means an individual, corporation, company, association, authority, firm, partnership, society, State, local government, or any other organization or group of people.

Selection process means the period with respect to a selection for assistance that begins when the HUD official responsible for awarding the assistance involved, or his or her designee, makes a written request (which includes the selection criteria to be used in providing the assistance) to the Office of General Counsel (OGC) to prepare the NOFA, solicitation, or request for applications for assistance for publication in the FEDERAL REGISTER. The period includes the evaluation of applications, and concludes with the announcement of the selection of recipients of assistance.

§ 4.24 Scope.

(a) *Coverage.* The prohibitions against improper disclosure of covered selection information apply to any person who is an employee of the Department. In addition, the Department will require any other person who participates at the invitation of the Department in the selection process to sign a certification that he or she will be bound by the provisions of this part.

(b) *Applicability.* The prohibitions contained in this part apply to conduct occurring on or after June 12, 1991.

§ 4.26 Permissible and impermissible disclosures.

(a) Notwithstanding the provisions of Section 103, an employee is permitted to disclose information during the selection process with respect to:

(1) The requirements of a HUD program or programs, including unpublished policy statements and the provision of technical assistance concerning program requirements, provided that the requirements or statements are disclosed on a uniform basis to any applicant or potential applicant. For purposes of this part, the term "technical assistance" includes such activities as explaining and responding to questions about program regulations, defining terms in an application package, and providing other forms of technical guidance that may be described in a NOFA. The term "technical assistance" also includes identification of those parts of an application that need substantive improvement, but this term does not include advising the applicant how to make those improvements.

(2) The dates by which particular decisions in the selection process will be made;

(3) Any information which has been published in the FEDERAL REGISTER in a NOFA or otherwise;

(4) Any information which has been made public through means other than the FEDERAL REGISTER;

(5) An official audit, inquiry or investigation, if the disclosure is made to an auditor or investigator authorized by the HUD Inspector General to conduct the audit or investigation;

(6) Legal activities, including litigation, if the disclosure is made to an at-

torney who is representing or is otherwise responsible to the Department in connection with the activities; or

(7) Procedures that are required to be performed to process an application, e.g., environmental or budget reviews, and technical assistance from experts in fields who are regularly employed by other government agencies, provided that the agency with which the expert is employed or associated is not an applicant for HUD assistance during the pending funding cycle.

(b) An authorized employee, during the selection process, may contact an applicant for the purpose of:

(1) Communication of the applicant's failure to qualify, after a preliminary review for eligibility and completeness with respect to his or her application, and the reasons for the failure to qualify, or the fact of the applicant's failure to be determined to be technically acceptable after a full review; or

(2) Clarification of the terms of the applicant's application. A clarification, for the purpose of this paragraph (b), may include a request for additional information consistent with regulatory requirements.

(c) Prohibition of advance disclosure of funding decisions. During the selection process an employee shall not knowingly disclose any covered selection information regarding the selection process to any person other than an employee authorized to receive that information.

(1) The following disclosures of information are, at any time during the selection process, a violation of Section 103:

(i) Information regarding any applicant's relative standing;

(ii) The amount of assistance requested by any applicant;

(iii) Any information contained in an application;

(2) The following disclosures of information, before the deadline for the submission of applications, shall be a violation of Section 103:

(i) The identity of any applicant; and

(ii) The number of applicants.

§ 4.28 Civil penalties.

Whenever any employee knowingly and materially violates the prohibition in Section 103, the Department may

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impose a civil money penalty on the employee in accordance with the provisions of 24 CFR part 30.

§ 4.30 Procedure upon discovery of a violation.

(a) *In general.* When an alleged violation of Section 103 or this subpart B comes to the attention of any person, including an employee, he or she may either:

(1) Contact the HUD Ethics Law Division to provide information about the alleged violation; or

(2) Contact the HUD Office of Inspector General to request an inquiry or investigation into the matter.

(b) *Ethics Law Division.* When the Ethics Law Division receives information concerning an alleged violation of Section 103, it shall refer the matter to the Inspector General stating the facts of the alleged violation and requesting that the Inspector General make an inquiry or investigation into the matter.

(c) *Inspector General.* When the Inspector General receives information concerning an alleged violation of Section 103 or this subpart B, he or she shall notify the Ethics Law Division when the Inspector General begins an inquiry or investigation into the matter.

(d) *Protection of employee complainants.* (1) No official of the Ethics Law Division, after receipt of information from an employee stating the facts of an alleged violation of this part, shall disclose the identity of the employee without the consent of that employee. The Inspector General, after receipt of information stating the facts of an alleged violation of this part, shall not disclose the identity of the employee who provided the information without the consent of that employee, unless the Inspector General determines that disclosure of the employee's identity is unavoidable during the course of an investigation. However, any employee who knowingly reports a false alleged violation of this part is not so protected and may be subject to disciplinary action.

(2) Any employee who has authority to take, direct others to take, recommend or approve a personnel action is prohibited from threatening, taking, failing to take, recommending, or ap-

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proving any personnel action as reprisal against another employee for providing information to investigating officials.

§ 4.32 Investigation by Office of Inspector General.

The Office of Inspector General shall review every alleged violation of Section 103. If after a review the Office of Inspector General determines that further investigation is not warranted, it shall notify the Ethics Law Division of that determination. If, after a review, the Office of Inspector General determines that additional investigation is warranted, it shall conduct the investigation and upon completion issue a report of the investigation to the Ethics Law Division as to each alleged violation.

§ 4.34 Review of Inspector General's report by the Ethics Law Division.

After receipt of the Inspector General's report, the Ethics Law Division shall review the facts and circumstances of the alleged violations. In addition, the Ethics Law Division may:

(a) Return the report to the Inspector General with a request for further investigation;

(b) Discuss the violation with the employee alleged to have committed the violation; or

(c) Interview any other person, including employees who it believes will be helpful in furnishing information relevant to the inquiry.

§ 4.36 Action by the Ethics Law Division.

(a) After review of the Inspector General's report, the Ethics Law Division shall determine whether or not there is sufficient information providing a reasonable basis to believe that a violation of Section 103 or this subpart B has occurred.

(b) If the Ethics Law Division determines that there is no reasonable basis to believe that a violation of Section 103 or this subpart B has occurred, it shall close the matter and send its determination to the Office of Inspector General.

(c) If the Ethics Law Division determines that there is sufficient information to provide a reasonable basis to believe that a violation of Section 103 or this subpart B has occurred, it shall:

(1) Send its determination to the Office of Inspector General; and

(2) Refer the matter to the appropriate official for review as to whether to impose a civil money penalty in accordance with 24 CFR part 30; provided, however, that the Ethics Law Division shall not make a civil money penalty recommendation unless it finds the violation to have been knowing and material. The decision to impose a civil money penalty in a particular matter may be made only upon referral from the Ethics Law Division.

(d) In determining whether a violation is material, the Ethics Law Division shall consider the following factors, as applicable:

(1) The content of the disclosure and its significance to the person to whom the disclosure was made;

(2) The time during the selection process when the disclosure was made;

(3) The person to whom the disclosure was made;

(4) The dollar amount of assistance requested by the person to whom the disclosure was made;

(5) The dollar amount of assistance available for a given competition or program;

(6) The benefit, if any, received or expected by the employee, the employee's relatives or friends, or any other person with whom the employee is affiliated;

(7) The potential injury to the Department.

(e) If the Ethics Law Division determines that there is sufficient information to provide a reasonable basis to believe that a violation of Section 103 or this subpart B has occurred, it may, in addition to referring the matter under 24 CFR part 30, refer the matter to an appropriate HUD official for consideration of any other available disciplinary action. Any referral authorized by this paragraph (e) shall be reported to the Inspector General and may be reported to the employee's supervisor.

§ 4.38 Administrative remedies.

(a) If the Department receives or obtains information providing a reasonable basis to believe that a violation of Section 103 has occurred, the Department may impose a sanction, as determined to be appropriate, upon an applicant for or a recipient of assistance who has received covered selection information.

(b) In determining whether a sanction is appropriate and if so which sanction or sanctions should be sought, the Secretary shall give consideration to the applicant's conduct with respect to the violation. In so doing, the Secretary shall consider the factors listed at § 4.36(d), as well as any history of prior violations in any HUD program, the benefits received or expected, deterrence of future violations and the extent of any complicity in the violation.

(c) The Secretary may impose a sanction authorized by this section whether or not the Ethics Law Division refers a case under 24 CFR part 30, and whether or not a civil money penalty is imposed.

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

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